

Mediator Misconduct – What Can Be Done To Prevent It?

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What qualities do you look for when selecting a Mediator? If you're like most litigators, your selection criteria are not absolute but varied depending on the dynamics of the particular case. Some matters are better suited for a mild-manner Mediation approach, while others may require a bit more muscle. A Mediator's ability to fit these varying roles enhances his or her marketability. But, what happens when the Mediator crosses the line, when the role overtakes the entire process?

The right of self-determination is the fundamental essence of Mediation, a stark alternative to traditional dispute resolution via jury trial. "The purpose of mediation is to provide a forum for consensual dispute resolution by the parties." Rule 10.300, Florida Rules for Mediators. To further this objective, the Florida Supreme Court established standards of conduct for certified and court-appointed Mediators, who shall not:

- intentionally or knowingly misrepresent facts or conditions while conducting the conference - Rule 10.310(c),
- coerce or improperly influence any party - Rule 10.310(b),
- maintain bias or partiality toward a party or a party's cause – Rule 10.330,
- make substantive decisions for any party – Rule 10.310(a),
- proceed when a relationship with any participant raises the appearance of a conflict of interest – Rule 10.340(a),
- violate confidentiality except when required by law – Rule 10.360,
- provide legal advice to a participant – Rule 10.370(b),
- render any personal or professional opinions relating to the dispute or its outcome – Rule 10.370(c),
- terminate or prolong a Mediation conference against a party's wishes – Rule 10.420.

You may have noticed the many gray areas amidst these stark prohibitions, as almost any negotiation setting has the potential to violate many of these ideals. The Mediator's task is not as simple as its appearance may suggest.

Sadly, Mediators sometimes fail to honor the parties' rights to self-determination, usually at the urging of a party itself. In Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. 4th DCA 2001), the Mediator was alleged to have coerced an agreement by rendering legal opinions, predicting court rulings, using time constraints to pressure decisions, physically displaying frustration toward the party, and threatening to identify the party to the court as the reason a settlement was not reached. The court held that such behavior by the Mediator, if proven, would suffice to invalidate an agreement between the principals.

"While mediation techniques and practice styles may vary from mediator to mediator and mediation to mediation, a line is crossed and ethical standards are violated when any conduct of the mediator serves to compromise the parties' basic right to agree or not to agree." Rule 10.310,

Committee Notes, 2000 Revision. Hopefully, this article will help to prevent Mediators, and the parties who pressure them, from engaging in conduct or tactics that violate the Rules and negate the enforceability of any agreement so obtained.

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments, and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments, or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.